ELBERT O. JENSEN

IBLA 79-32 Decided January 17, 1979

Appeal from a decision of the Utah State Office, Bureau of Land Management, holding certain lode mining claims to be conditionally abandoned. UT-MC2-11 inc.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Federal Land Policy and Management Act of 1976: Service Charges

   The owner of an unpatented mining claim located after Oct. 21, 1976, on Federal land shall file within 90 days after the date of location of that claim in the proper BLM office a copy of the official record of the notice or certificate of location of the claim filed under State law. A copy of the notice or certificate shall be supplemented by, inter alia: (1) a map with a scale of not less than one-quarter inch to a mile showing the survey or protraction grids on which there will be depicted the location of the claim or site; and (2) a $5 service fee (non-returnable) for each claim filed. Failure to file such instruments within the proper time period shall be deemed conclusively to constitute an abandonment of the mining claim, and it shall be void.

2. Administrative Procedure: Rule Making--Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Federal Land Policy and Management Act of 1976: Rules and Regulations--Federal Land Policy and Management Act of 1976: Service Charges--Regulations: Generally

   Where a mining claim is located after the enactment of the Federal Land Policy and

Management Act of 1976 (Oct. 21, 1976), but before the date of promulgation of regulations implementing the statutory requirements of the Act relative to the recordation of mining claims, a regulation having retroactive effects may nonetheless be sustained in spite of such retroactivity if it is reasonable.

APPEARANCES: Elbert O. Jensen, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Elbert O. Jensen appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated September 1, 1978, holding lode mining claims Elect 1-10 to be abandoned if deficiencies under 43 CFR 3830 are not corrected within 30 days.

On November 15, 1976, appellant located 10 lode mining claims denominated Elect 1-10 in secs. 28, 29, and 33, T. 11 S., R. 12 W., Salt Lake meridian. On December 17, 1976, notices of location for each of the 10 claims were filed in a timely fashion with the Utah State Office.

In a Notice of Deficiency dated March 21, 1977, the Chief, Branch of Records and Data Management, BLM, informed appellant that his filing was deficient in its failure to include a map of each claim located and a $5 nonrefundable service fee for each claim filed as required by 43 CFR Part 3830.

Thereafter, BLM mailed a second Notice of Deficiency, dated September 1, 1978, restating the defects in appellant's filing and informing appellant that the maps and fees necessary to complete his filing must be received by BLM within thirty (30) days of receipt of the notice or his claims would be considered abandoned.

In a letter captioned "Appeal," dated September 26, 1978, appellant states in toto: "Your strict oil and gas regulations have been a detriment to me in Wyoming, New Mexico and Utah. I am appealing your action because I question that there were rules or regulations in effect when these claims were accepted in your office."

We note that Jensen's appeal is dated September 26, 1978, prior to the expiration of the 30-day period during which appellant's submission of the required maps and fees would have been considered timely. We further note that the case file does not reveal that BLM has taken any subsequent formal action to declare the claims in question null and void, despite the fact that appellant has failed to file the required maps and fees.

The effect of retroactive application of 43 CFR 3833.1-2 is to require appellant to pay a total of $50 in service fees and furnish a map of each of his claims. We find it hard to believe that such requirements would have dissuaded appellant from filing his 10 claims had he been aware of these requirements prior to location. Indeed, it is reasonable for appellant to expect that the filing of a location notice as required by FLPMA be accompanied by a filing fee, as contemplated under 43 U.S.C. § 1734 (West Supp. 1978), and a simple map of the claims involved. The regulation here hardly constitutes a change in the statute.

Appellant has brought to our attention no case in which BLM has waived the requirements at issue for a claimant similarly situated

We note that BLM gave appellant a grace period in excess of 1-1/2 years to meet the requirements at issue here. In light of this generous allowance, we do not regard imposition of a $50 service fee and preparation of simple maps as an inordinately harsh result.

In his Administrative Law Treatise (1st ed. 1958), K. Davis comments on facts similar to those at hand:

> Indeed, under a common form of statutory delegation, legislative regulations must be initially retroactive. This is true whenever the statute provides specified results but delegates power to prescribe details through legislative regulations. For instance, a statute becoming effective in June may provide that a tax or a deduction shall be computed in accordance with regulations to be prescribed by the Commissioner with the approval of the Secretary, the taxable events may occur in July, and the regulations may be published in September; no practical course is possible except to apply the regulation retroactively. (Vol. 1, p. 342)

We hold that retroactive application of 43 CFR 3833.1-2 is reasonable under the standards enunciated in the Anderson, Clayton & Co. case, supra, especially in light of the generous grace period allowed by BLM for compliance.

For purposes of this appeal, we shall regard BLM's admonition that it would consider appellant's claims to be abandoned in the absence of timely filed maps and fees as tantamount to a decision holding the claims in question to be null and void effective October 5, 1978, 30 days after receipt by appellant of the second Notice of Deficiency.

The regulations at issue here were promulgated by the Secretary of the Interior to implement the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 et seq. (West Supp. 1978). See sections 1740, 1744. The Act itself was effective October 21, 1976.

[1] Appellant complains of the regulations set forth in 43 CFR 3833.1-2:

> (c) The copy of the notice or certificates filed in accordance with paragraphs (a) and (b) of this section shall be supplemented by the following additional information unless [sic] it is included in the copy:
>
> * * * * * * *
>
> (7) A map with a scale of not less than 1/4 inch to a mile showing the survey or protraction grids on which there will be depicted the location of the claim or site. Contiguous claims or sites in the same general area may be depicted on this single map so long as the individual claims or sites are clearly identified;
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> * * * * * * *
>
> (d) Each claim or site filed shall be accompanied by a $5 service fee which is not returnable.

The effect of a failure to make timely filings of the required documents and fees is set forth in 43 CFR 3833.4: "(a) The failure to file such instruments as are required by §§ 3833.1 and 3833.2 within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill site, or tunnel site and it shall be void."

The regulations set forth above were effective on January 20, 1977. Publication of these regulations was made on January 27, 1977, in 42 FR 5300. Hence appellant is correct that the applicable regulations were not in effect at the time of his filing notices of location for lode claims, Elect 1-10.

This fact, however, does not prevent BLM from requiring compliance with the terms of the regulations. The prohibition found in U.S. CONST., art. I, § 9, against ex post facto laws has always been

limited to criminal law and has never applied to civil legislation or regulations. Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798).

[2] Where a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (D.C. Cir. 1967); General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). In General Telephone, supra, the Fifth Circuit quotes Justice Cardozo on the subject:

> Hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision. Cardozo, The Nature of the Judicial Process 145 (1921).

In SEC v. Chenery, 332 U.S. 194, 203, 67 S.Ct. 1575, 1581, 91 L.Ed. 1995 (1947), the Supreme Court said:

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

That legislative rules may be applied retroactively is settled law. Anderson, Clayton & Co. v. United States, 562 F.2d 972, 984 (5th Cir., 1977), cert. denied, 98 S.Ct. 2845 (1978). Cases cited in Anderson, Clayton & Co., supra, set forth a list of considerations that are helpful to a court in balancing the interests of the Government and the appellant. That list includes:

> (1) whether or to what extent the taxpayer justifiably relied on settled prior law or policy and whether or to what extent the putatively retroactive regulation alters that law; (2) the extent, if any, to which the prior law or policy has been implicitly approved by Congress, as by legislative reenactment of the pertinent Code provisions; (3) whether retroactivity would advance or frustrate the interest in equality of treatment among similarly situated taxpayers; and (4) whether according retroactive effect would produce an inordinately harsh result.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Douglas E. Henriques
Administrative Judge

We concur:

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Joseph W. Goss
Administrative Judge

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Frederick Fishman
Administrative Judge